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## Race to the Left: A Legislator's Guide to Greening a Corporate Code

### TABLE OF CONTENTS

I.	Interstate Competition for Corporate Charters .....	492
A.	The Race to the Bottom and the Race to the Top.....	492
B.	The Green Business Movement and the Coming Race to the Left .....	495
II.	Greening a Corporate Code .....	500
A.	General Provisions .....	503
B.	Provisions for Electing Corporations .....	504
C.	Concerns.....	508
	Conclusion.....	510
	Appendix .....	511

American corporate law tolerates green businesses. Green business decisions that are informed, disinterested, and made in the good-faith best interests of the firm will enjoy deference pursuant to the business judgment rule, whether the decisions maximize shareholder profits or sacrifice them in the name of sustainability.<sup>1</sup>

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<sup>1</sup> See generally Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and a New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987 (2009) [hereinafter Sneirson, *Green Is Good*] (debunking the myth of shareholder wealth maximization and demonstrating corporate law's compatibility with sustainable business practices).

Corporate law generally stops there, however, and neither encourages green business efforts nor particularly discourages them.

States are more or less uniform in this approach, and thus new businesses selecting a state of incorporation have had no green basis for preferring one state's corporate laws to those of another. Recent efforts in Oregon to green its corporate law signal a change to this status quo. Perhaps these efforts portend a new round of interstate competition for corporate charters, as states like Oregon begin to vie with one another to attract green business charters and their associated revenue.

This Article proceeds as follows. Part I recounts previous bouts of interstate competition for corporate charters and notes the "race-to-the-bottom" and "race-to-the-top" theories that purport to explain their results. Part I then describes the current movement toward green or sustainable business practices, notes the compatibility of these practices with current corporate law, and posits that the trend will trigger a new race among states to attract corporate charters—not to the bottom nor to the top but rather "to the left."<sup>2</sup> Part II opens with a description of Oregon's recent efforts to make its corporate law more amenable to green businesses, and then the Article proposes a comprehensive agenda for greening a state's corporate code. Some of these suggestions take the form of generally applicable provisions consistent with current corporate law and aimed at clarifying its compatibility with green business practices. The remaining suggestions form a set of optional provisions that allow firms wishing to be governed by more stringent, green business standards to elect to do so.

## I

### INTERSTATE COMPETITION FOR CORPORATE CHARTERS

#### A. *The Race to the Bottom and the Race to the Top*

Under the "internal affairs doctrine," courts apply the law of a firm's state of incorporation to resolve matters of corporate

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<sup>2</sup> The metaphor references the association of sustainability with the political left, although green business and its potential profits appeal to the entire political spectrum. Indeed, studies have shown that sustainable business efforts tend to enhance rather than sacrifice profits. See Judd F. Sneirson, *Doing Well by Doing Good: Leveraging Due Care for Better, More Socially Responsible Corporate Decisionmaking*, 3 CORP. GOVERNANCE L. REV. 438, 440 & n.3, 449 (2007) [hereinafter Sneirson, *Doing Well*] (citing studies); Sneirson, *Green Is Good*, *supra* note 1, at 1009 & n.115, 1010 & n.117 (same).

governance.<sup>3</sup> Thus, in deciding whether to pierce a firm's corporate veil, or whether a firm's fiduciaries breached their duties to the company or its shareholders, the law of the charter-granting jurisdiction applies.<sup>4</sup> This doctrine has been universally accepted and it effectively enables states seeking firms' tax and other revenue to compete with one another for incorporation business.<sup>5</sup> States have done so by appealing to the corporate managers who make the firm's incorporation (or reincorporation) decisions.<sup>6</sup>

Two theories eventually emerged to explain the basis on which these states competed. The first of these—the “race to the bottom”—posits that states attract corporate managers to their jurisdictions by offering management-friendly corporate laws that place no limits on permissible corporate purposes, respect limited liability, afford managers significant decision-making discretion, and otherwise erect obstacles to shareholder litigation.<sup>7</sup> The theory explains both how New Jersey wrested corporate charters from then-dominant New York at the turn of the last century, and how Delaware subsequently attracted those firms to reincorporate under its now-dominant corporate law regime.<sup>8</sup>

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<sup>3</sup> STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS § 1.3(A), at 14 (2002) (noting that the internal affairs doctrine does not require any meaningful connection between the firm and its state of incorporation).

<sup>4</sup> See, e.g., *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1456 (2d Cir. 1995) (“The district court correctly noted that [u]nder New York choice of law principles, [t]he law of the state of incorporation determines when the corporate form will be disregarded and liability will be imposed on shareholders.” (internal quotation marks omitted)); *Paulman v. Kritzer*, 219 N.E.2d 541, 543 (Ill. App. Ct. 1966) (applying Delaware law to determine whether directors of a Delaware corporation breached their fiduciary duties), *aff'd*, 230 N.E.2d 262 (Ill. 1967).

<sup>5</sup> See BAINBRIDGE, *supra* note 3, § 1.3(A), at 14–15 (describing a “common market for corporate charters”). In so competing, states give effect to the following idea Justice Brandeis famously articulated: “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory . . . .” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Of course, such competition has a downside, as Brandeis later noted in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 559 (1933) (Brandeis, J., dissenting) (describing what was later termed a “race to the bottom” as “[t]he race was one not of diligence but of laxity”).

<sup>6</sup> BAINBRIDGE, *supra* note 3, § 1.3(A), at 15.

<sup>7</sup> See William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 665–70 (1974); see also Lucian Ayre Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1440 (1992) (arguing that “state competition produces a race for the top with respect to some corporate issues but a race for the bottom with respect to others”).

<sup>8</sup> See Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1990*, 32 J. CORP. L. 323, 324–31 (2007); see

An alternate theory of interstate charter competition argues that states race “to the top,” not the bottom, by developing the best and most efficient set of corporate laws, which are not necessarily the most management-friendly.<sup>9</sup> Among other things, race-to-the-top adherents argue that investors will be reluctant to invest in, and lenders will be reluctant to lend to, firms governed by excessively promanagement laws.<sup>10</sup> Regardless of which narrative best explains the initial corporate charter migration to Delaware, the race to the top best explains Delaware corporate law’s continued prominence.<sup>11</sup> Though Delaware corporate law may not always be promanagement,<sup>12</sup> the richness of its decisional law, the experience of its corporate bar, and the expertise and efficiency of its judiciary together amply justify Delaware’s current position as the preferred state in which to incorporate.<sup>13</sup>

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also D. Gordon Smith, Debate, *Response: The Dystopian Potential of Corporate Law*, 57 EMORY L.J. 985, 1006–07 (2008).

<sup>9</sup> See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251, 255–58 (1977). See generally ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993); William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303 (1997); Frank H. Easterbrook, *Managers’ Discretion and Investors’ Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540, 554–71 (1984); Daniel R. Fischel, *The “Race to the Bottom” Revisited: Reflections on Recent Developments in Delaware’s Corporation Law*, 76 NW. U. L. REV. 913 (1982); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987).

<sup>10</sup> BAINBRIDGE, *supra* note 3, § 1.3(A), at 15 (citing empirical studies that support the race-to-the-top theory). Another take on this debate posits that the federal government, not interstate charter competition, exerts the most pressure on Delaware corporate law’s development. See generally Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003).

<sup>11</sup> See BAINBRIDGE, *supra* note 3, § 1.3(A), at 16.

<sup>12</sup> See, e.g., DEL. CODE ANN. tit. 8, § 220 (Supp. 2008) (imposing relatively lenient requirements on shareholders seeking to inspect corporate books and records); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660–61 (Del. Ch. 1988) (applying strict scrutiny to management interference with the shareholder franchise); Stephen M. Bainbridge, *Why the North Dakota Publicly Traded Corporations Act Will Fail*, 84 N.D. L. REV. 1043, 1044–45 (2008) (noting that Delaware law has no antitakeover provision and is thus friendlier than other states toward hostile takeovers and, by extension, shareholder value).

<sup>13</sup> BAINBRIDGE, *supra* note 3, § 1.3(A), at 4; see also Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1062–64 (2000). But see Judd F. Sneirson, *Soft Paternalism for Close Corporations: Helping Shareholders Help Themselves*, 2008 WIS. L. REV. 899, 903 n.10 (noting that closely held corporations tend to incorporate locally for tax and other reasons). Thus, even if another state were to both adopt Delaware corporate law wholesale, including its entire body of decisional law, and undercut Delaware’s franchise tax structure, this state would still lack Delaware’s bar and judiciary and thus prove an inferior incorporation choice.

*B. The Green Business Movement and the Coming Race to the Left*

Green or sustainable businesses take a broader view of corporate performance than merely looking at the simple economic return on capital investment. In addition to “the traditional bottom line of financial performance,” sustainable firms also mind “their impact on the broader economy, the environment, and on the society in which they operate.”<sup>14</sup> These companies therefore strive to do business while “treading as lightly as possible on the earth and its natural resources” and, depending on the firm, they may develop “products, services, and technologies that contribute to larger societal efforts to live more sustainably.”<sup>15</sup>

This three-dimensional view of business also serves an accounting function: using the triple bottom-line approach, “a firm can measure its financial success as well as the extent to which it is ‘reducing (or increasing) the options available to future generations’ during a particular reporting period.”<sup>16</sup> Specifically, while the financial aspect of the triple bottom line concerns traditional economic data, the environmental component focuses on a firm’s “compliance against [environmental] regulations and other standards; the performance of internal management systems; trends in energy usage, waste production, and recycling; and the use of eco-efficient technologies.”<sup>17</sup> To complete the picture, the social component “aims to assess the impact of an organization . . . on people both inside and outside,”<sup>18</sup> addressing topics such as “community relations, product safety, training and education initiatives, sponsorship, charitable donations of money and time, and employment of disadvantaged groups.”<sup>19</sup> Many companies already voluntarily report in all three of these areas.<sup>20</sup> Although these reports can vary in format, making it

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<sup>14</sup> See ANDREW W. SAVITZ WITH KARL WEBER, *THE TRIPLE BOTTOM LINE: HOW TODAY’S BEST-RUN COMPANIES ARE ACHIEVING ECONOMIC, SOCIAL, AND ENVIRONMENTAL SUCCESS—AND HOW YOU CAN TOO*, at xii (2006).

<sup>15</sup> See Sneirson, *Green Is Good*, *supra* note 1, at 991.

<sup>16</sup> *Id.* at 991–92 (quoting JOHN ELKINGTON, *CANNIBALS WITH FORKS: THE TRIPLE BOTTOM LINE OF 21ST CENTURY BUSINESS* 92 (1998)); see also MARC J. EPSTEIN, *MAKING SUSTAINABILITY WORK: BEST PRACTICES IN MANAGING AND MEASURING CORPORATE SOCIAL, ENVIRONMENTAL AND ECONOMIC IMPACTS* 223–48 (2008).

<sup>17</sup> ELKINGTON, *supra* note 16, at 82; see also EPSTEIN, *supra* note 16, at 230–31 (listing information commonly reported by companies).

<sup>18</sup> ELKINGTON, *supra* note 16, at 87.

<sup>19</sup> *Id.* at 87–88.

<sup>20</sup> See EPSTEIN, *supra* note 16, at 223 (reporting that 20% of companies in the *Fortune* Global 250 “included a sustainability section in their annual reports, while 54% published

difficult to draw comparisons, the Global Reporting Initiative Sustainability Reporting Guidelines, now in their third version, provide some standardization.<sup>21</sup>

Despite the current economic downturn, the green business movement continues to gain momentum.<sup>22</sup> Many investors see green business efforts in fields such as renewable energy, green building materials, and green technology as responsible, profitable responses to the current energy, climate change, and economic crises.<sup>23</sup> And no matter what the industry, companies are embracing green business practices more and more—not necessarily out of respect for the environment and future generations, but rather because such practices often cut energy and other costs, reduce waste, and, on the whole, prove efficient and profitable.<sup>24</sup>

American corporate law permits firms to pursue these sorts of green practices and business plans. Corporate law contains no

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a separate sustainability report”). For examples from various companies, see Nike, Inc., Nike Responsibility: Reporting, <http://www.nikebiz.com/responsibility/reporting.html> (last visited Jan. 7, 2010); Starbucks Coffee Co., Global Responsibility, <http://www.starbucks.com/aboutus/gr.asp> (last visited Jan. 7, 2010); The Timberland Co., CSR: Transparency & Accountability, [http://www.timberland.com/corp/index.jsp?page=../include/csr\\_reports](http://www.timberland.com/corp/index.jsp?page=../include/csr_reports) (last visited Jan. 7, 2010); Walmart Stores, Inc., Global Sustainability Report, <http://walmartstores.com/Sustainability/7951.aspx> (last visited Jan. 7, 2010).

<sup>21</sup> See ELKINGTON, *supra* note 16, at 82, 84 (noting difficult comparisons); EPSTEIN, *supra* note 16, at 224–25 (discussing the “GRI” guidelines while noting that nearly one thousand firms in more than sixty countries use the GRI framework and “34 companies in the [Standard & Poor’s] 100 Index use . . . it for their external reporting”); see also Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1299–1305, 1307–11 (1999) (offering models for social and environmental corporate disclosures).

<sup>22</sup> See, e.g., UNITED NATIONS ENV’T PROGRAMME, GLOBAL GREEN NEW DEAL: POLICY BRIEF 1–2 (2009), available at [http://www.unep.org/pdf/A\\_Global\\_Green\\_New\\_Deal\\_Policy\\_Brief.pdf](http://www.unep.org/pdf/A_Global_Green_New_Deal_Policy_Brief.pdf); Christopher Dickey & Tracy McNicoll, *Why It’s Time for a ‘Green New Deal,’* NEWSWEEK, Nov. 10, 2008, at 49–52.

<sup>23</sup> See Nancy Floyd, *Speech*, 88 OR. L. REV. 343 (2009); Sneirson, *Green Is Good*, *supra* note 1, at 1010; see also Claire Cain Miller, *Venture Firm’s ‘Green’ Funds Top \$1 Billion*, N.Y. TIMES, Sept. 1, 2009, at B1 (reporting on venture capital investments in clean technology that address climate change).

<sup>24</sup> See Sneirson, *Green Is Good*, *supra* note 1, at 991 n.11, 992 n.15, 1009–10 nn.115–17 (citing studies and examples); Jared Diamond, Op-Ed., *Will Big Business Save the Earth?*, N.Y. TIMES, Dec. 6, 2009, at WK12 (“Lower consumption of environmental resources saves money in the short run. Maintaining sustainable resource levels and not polluting saves money in the long run. And a clean image—one attained by, say, avoiding oil spills and other environmental disasters—reduces criticism from employees, consumers and government.”).

requirement that fiduciaries maximize shareholder profits or wealth.<sup>25</sup> Thus, corporate decision makers may consider and affirmatively cater to the interests of all of the firm's various constituencies—its shareholders, to be sure, but also its employees, creditors, suppliers, customers, and the communities in which it operates. In fact, according to a leading financial economist, managers best enhance long-term firm value (and thus long-term shareholder wealth) by reaching decisions and conducting firm business in this broader-minded way.<sup>26</sup>

The modern business judgment rule affirms this view of corporate governance and fiduciaries' obligations. Under the business judgment rule, courts respect fiduciaries' business judgments so long as these managers act loyally, in good faith, and according to the procedural requirements of the duty of care.<sup>27</sup> The duty of care

<sup>25</sup> The incorrect view that fiduciaries must maximize shareholder wealth is unfortunately quite common. See, e.g., BAINBRIDGE, *supra* note 3, § 1.4(B), at 20–23, § 9.2–.3, at 410–29. For refutation of this position, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 299–302 (1999); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 736–37 (2005); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 J. LEGAL EDUC. 351, 361 (2004); Ian B. Lee, *Corporate Law, Profit Maximization, and the "Responsible" Shareholder*, 10 STAN. J.L. BUS. & FIN. 31, 33–36 (2005); Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1666–67 (2002); Tara J. Radin, *Stakeholders and Sustainability: An Argument for Responsible Corporate Decision-Making*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 363, 389–90 (2007); Sneider, *Green Is Good*, *supra* note 1, at 995–1007; Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 168–72 (2008). Some Delaware cases seemingly require that corporate decisions aim to benefit the firm's shareholders, however remotely, see, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders."), although this requirement is both difficult to enforce and in any event usually met. Smith, *supra* note 8, at 1002 (calling the "shareholder primacy norm . . . both unenforced and unenforceable"); Sneider, *Green Is Good*, *supra* note 1, at 1005 (noting that the business judgment rule renders any requirement to enhance or maximize shareholder wealth "unenforceable and meaningless").

<sup>26</sup> Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, J. APPLIED CORP. FIN., FALL 2001, at 8–9, 16–17. This comports with studies and meta-studies demonstrating a positive correlation between corporate social responsibility and profitability. See Sneider, *Doing Well*, *supra* note 2, at 440 & n.3; see also Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1439 (1993) ("In most situations, shareholder and nonshareholder constituency interests coincide.").

<sup>27</sup> William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1297–98 (2001) (describing the business judgment rule as "an expression of a policy of non-review of a board of directors'

entails acting without a conflict of interest, conscientiously, on the basis of reasonably full information, and with a good-faith belief that a decision will serve the firm's best interests.<sup>28</sup> If these predicates are met, business decisions, including green business decisions that may depart from a wealth-maximizing objective, should both enjoy abstention-like deference and withstand legal challenges.<sup>29</sup>

Jurisdictions are more or less uniform in this approach, subject to two minor qualifications. First, some jurisdictions—notably Delaware and states with large business centers like New York—have better-developed corporate law than others.<sup>30</sup> As a result, those states' fiduciary duty standards and business judgment rules are very well defined and more predictably applied. States without such precedents pose at least a risk that disinterested, procedurally careful,

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decision"); see also *Joy v. North*, 692 F.2d 880, 885–86 (2d Cir. 1982) (presenting rationales for the business judgment rule). For a discussion of whether the business judgment rule should apply to corporate officers or just to directors, compare Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005), which argues that the rule should not apply to officers, with BAINBRIDGE, *supra* note 3, § 6.4(D), at 285–86, which notes the divided precedents and concludes that “the better view is that officers are eligible for the protections of the business judgment rule,” and *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009), which explicitly holds that directors' and officers' fiduciary duties are identical.

<sup>28</sup> Sneirson, *Doing Well*, *supra* note 2, at 457–61 (arguing also that the duty of care's reasonably full information component requires fiduciaries to assess and consider the effects on the firm's nonshareholder constituencies).

<sup>29</sup> See BAINBRIDGE, *supra* note 3, § 6.2, at 244 (considering the business judgment rule as an abstention doctrine). One seeming departure from these principles is the *Revlon*, Inc., line of takeover cases. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986). Under *Revlon*, where a company will no longer continue as a going concern, the Delaware Supreme Court requires that the company's board obtain the best sale price it reasonably can for the company and thus maximize shareholder returns. *Id.* at 182. In *Paramount Communications Inc. v. QVC Network Inc.*, the Court extended the *Revlon* holding to factual situations where, following a merger, the resulting entity is to be substantially owned and controlled by a single majority shareholder. See *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 36–41 (Del. 1993). In *Revlon* situations, it is perfectly consistent with the above principles to obligate boards to eschew other constituencies and focus exclusively on shareholders, as there will be little left to the company following its sale and breakup. In relatively rare *QVC* situations, it is only a minor departure “to obligate boards to afford a similar economic benefit to its shareholders.” Sneirson, *Green Is Good*, *supra* note 1, at 1007 & n.105. In any event, the vast majority of green business decisions involve operational issues, not takeovers, and thus the *Revlon* line of cases, while interesting, should not apply.

<sup>30</sup> This is one reason firms prefer to incorporate in Delaware. See *supra* text accompanying note 13.



good-faith business decisions will not be as respected as they would under other corporate law regimes.<sup>31</sup>

Second, thirty-three states have codified the concept that corporate fiduciaries may consider more than just shareholders when determining the firm's best interests.<sup>32</sup> About two-thirds of these so-called "other constituency statutes" are generally applicable, providing an extra measure of comfort where corporate managers make decisions that benefit the firm's nonshareholder constituencies.<sup>33</sup> The remaining third are limited to the takeover context and therefore only offer this statutory protection to a narrower class of corporate decisions.<sup>34</sup>

<sup>31</sup> See, e.g., *Naito v. Naito*, 35 P.3d 1068, 1083 (Or. Ct. App. 2001) (reciting the business judgment rule but then modifying the company's dividend policy to guard against further minority shareholder oppression); *Colvin v. Colvin*, No. 05-409-AA, 2007 WL 2248160, at \*11-15 (D. Or. Aug. 1, 2007) (reciting the business judgment rule but then substituting the court's judgment for the judgment of the corporate manager). Indeed, one of the functions of the business judgment rule, and corporate standards of review generally, is to minimize the risk of judicial errors. Allen et al., *supra* note 27, at 1294, 1296-97.

<sup>32</sup> The Illinois statute is typical. It provides:

In discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers may, in considering the best long term and short term interests of the corporation, consider the effects of any action (including without limitation, action which may involve or relate to a change or potential change in control of the corporation) upon employees, suppliers and customers of the corporation or its subsidiaries, communities in which offices or other establishments of the corporation or its subsidiaries are located, and all other pertinent factors.

805 ILL. COMP. STAT. ANN. 5/8.85 (West 2009). Most of the states that enacted these provisions did so during the surge of corporate takeover activity in the 1980s, often to help local corporations fend off out-of-state suitors. Sneirson, *Green Is Good*, *supra* note 1, at 997-98.

<sup>33</sup> See FLA. STAT. ANN. § 607.0830(3) (West 2009); GA. CODE ANN. § 14-2-202(b)(5) (West 2009); HAW. REV. STAT. § 414-221(b) (2009); 805 ILL. COMP. STAT. 5/8.85 (2009); IND. CODE ANN. § 23-1-35-1(d) (West 2009); ME. REV. STAT. ANN. tit. 13-C, § 832(6) (2009); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West 2009); MINN. STAT. § 302A.251(5) (2008); MISS. CODE ANN. § 79-4-8.30 (West 2009); NEB. REV. STAT. § 21-2432(2) (2008); NEV. REV. STAT. ANN. § 78-138(4) (West 2009); N.J. STAT. ANN. § 14A:6-1(2) (West 2009); N.M. STAT. ANN. § 53-11-35(D) (West 2009); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2009); N.D. CENT. CODE § 10-19.1-50(6) (2009); OHIO REV. CODE ANN. §§ 1701.13(F)(7), 1701.59(A), (D), (E) (West 2009); 15 PA. CONS. STAT. ANN. § 515 (West 2009); VT. STAT. ANN. tit. 11A, § 8.30 (2009); VA. CODE ANN. § 13.1-727.1 (West 2009); WIS. STAT. ANN. § 180.0827 (West 2009); WYO. STAT. ANN. § 17-16-830(e) (2009).

<sup>34</sup> See ARIZ. REV. STAT. ANN. § 10-2702 (2009); CONN. GEN. STAT. ANN. § 33-756(d) (West 2009); IDAHO CODE ANN. § 30-1602 (2009); IOWA CODE ANN. § 490.1108A (West 2008); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2006); LA. REV. STAT. ANN. § 12:92(G) (2008); MD. CODE ANN., CORPS. & ASS'NS § 2-104(b)(9) (West 2009); MO.

These slight variations notwithstanding, green businesses have had little reason to prefer one jurisdiction to another when deciding where to incorporate and whether to reincorporate in another state. Given the trend toward green businesses and practices, a state offering green-business-friendly corporate laws could distinguish itself and attract green business charters, their associated revenues, and perhaps other economic benefits.<sup>35</sup> Oregon is well situated to compete in this “race to the left” and has already begun efforts to position itself as “the Delaware of green business.” The next Part of this Article details these efforts and proposes a comprehensive set of provisions designed to make the corporate laws of Oregon, or any other state, more amenable to green business.

## II

### GREENING A CORPORATE CODE

In 2006, a group of Portland business lawyers set out to make Oregon’s corporate laws more amenable to green business.<sup>36</sup> The group’s first legislative project became law in 2007, amending Oregon’s corporate code to permit Oregon corporations to include provisions in their charters authorizing or directing that the firm be operated in an environmentally and socially responsible manner.<sup>37</sup> The amendment codifies the triple bottom-line concept discussed above,<sup>38</sup> while also enabling Oregon firms to explicitly opt into a sustainable or green corporate-governance structure.

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ANN. STAT. § 351.347(1) (West 2009); OR. REV. STAT. § 60.357 (2009); R.I. GEN. LAWS § 7-5.2-8 (2008); S.D. CODIFIED LAWS § 47-33-4 (2009); TENN. CODE ANN. § 48-103-204 (West 2009).

<sup>35</sup> In addition to raising franchise tax revenue and fees, green corporate laws may create business for local law firms and perhaps entice companies to locate their operations in the particular state.

<sup>36</sup> The group—a subset of the Oregon Lawyers for a Sustainable Future—includes Dick Roy, formerly of Stoel Rives LLP and currently the managing director of the Center for Earth Leadership, and Portland business attorneys from most of the city’s major law firms. The author joined the group in 2008.

<sup>37</sup> See H.R. 2826, 74th Legis. Assem., Reg. Sess. (Or. 2007) (codified at OR. REV. STAT. § 60.047(2)(e) (2009)). The statute is the first of its kind. For a fuller discussion of Oregon House Bill 2826 and its implications, see Sneirson, *Green Is Good*, *supra* note 1, at 1019–20; Alison Torbitt, Comment, *Implementing Corporate Climate Change Responsibility: Possible State Legislative and SEC Responses to Climate Change Through Corporate Law Reform*, 88 OR. L. REV. 581 (2009), which criticizes the law as too weak.

<sup>38</sup> See *supra* notes 14–16 and accompanying text.

The group's second project involves Oregon's other constituency statute.<sup>39</sup> The Oregon other constituency statute is currently limited to the corporate takeover context; that is, the law only expressly permits corporate decision makers to consider the interests of nonshareholder constituencies like employees, customers, suppliers, and communities when evaluating the merits of a proposal to acquire the company.<sup>40</sup> By removing this limitation and making the statute generally applicable, the proposed legislation would clarify uneven Oregon law on the business judgment rule; bring the state in line with the majority of jurisdictions with an other constituency statute; and, on some level, encourage directors of Oregon corporations—and their attorneys—to view the interests of their businesses more broadly.<sup>41</sup>

By building on these efforts, Oregon can lay claim to having the greenest corporate laws of any American jurisdiction. This niche is a natural fit for the state: Oregon is already considered a leader in sustainable products, services, and practices, including green building and renewable energy;<sup>42</sup> the state's legal community boasts expertise in each of these areas;<sup>43</sup> and Oregon's citizenry tends to value nature and the outdoors. Oregon Governor Theodore Kulongoski, as a

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<sup>39</sup> See H.R. 2829, 75th Legis. Assem., Reg. Sess. (Or. 2009).

<sup>40</sup> See OR. REV. STAT. § 60.357 (2009). In the nontakeover context, such considerations are permissible as a matter of decisional corporate law. See *supra* notes 25–29 and accompanying text.

<sup>41</sup> See cases cited *supra* note 31 (showing inconsistent business judgment rule decisions in Oregon). The proposed legislation also specifies “economic, environmental, and social considerations,” a reference to the triple bottom-line concept. See Or. H.R. 2829. For the author's testimony in support of the bill, see *Hearing on H.R. 2829 Before the H. Sustainability & Economic Development Comm.*, 75th Legis. Assem., Reg. Sess. (Or. 2009) (on file with author) (written testimony of Judd F. Sneirson, Assistant Professor, University of Oregon School of Law) [hereinafter Sneirson Testimony]. The House Sustainability and Economic Development Committee will hold further hearings on the bill in the coming legislative session.

<sup>42</sup> OR. BUS. PLAN STEERING COMM., 2009 OREGON BUSINESS PLAN POLICY PLAYBOOK, INITIATIVE AND CLUSTER GUIDE 8, 10–11 (2009) [hereinafter 2009 OR. BUS. PLAN], available at [http://www.oregonbusinessplan.org/pdf/2008\\_OBP\\_POLICY\\_PLAYBOOK\\_INITIATIVE\\_AND\\_CLUSTER\\_GUIDE\\_FINAL.pdf](http://www.oregonbusinessplan.org/pdf/2008_OBP_POLICY_PLAYBOOK_INITIATIVE_AND_CLUSTER_GUIDE_FINAL.pdf) (“No other state has as long and as deep a commitment [to sustainability] as our state.”); see also OR. REV. STAT. § 184.423 (2009) (setting forth Oregon's goals for sustainability); Floyd, *supra* note 23, at 352.

<sup>43</sup> Several Portland law firms, including Stoel Rives LLP, Miller Nash LLP, Lane Powell PC, Ater Wynne LLP, and Tonkon Torp LLP, have designated sustainability or related practice groups, and two of these practice groups maintain active law blogs on the topic. See Stoel Rives LLP, Renewable + Law, <http://www.lawofrenewableenergy.com> (last visited Jan. 7, 2010); Tonkon Torp LLP, Sustainability Law Blog, <http://www.sustainabilitylawblog.com> (last visited Jan. 7, 2010).

member of the Oregon Business Plan Leadership Committee, has even featured sustainable industries as the centerpiece of the state's business plan for economic development.<sup>44</sup> Green corporate laws would only complement these efforts.<sup>45</sup>

This Article proposes further green reforms to corporate law. The first group of proposals contains generally applicable provisions designed to clarify that firms may pursue green business plans and practices under current corporate law. The second group comprises a set of provisions for firms electing to attain "green corporation" status and operate according to a greener and stricter set of standards.

The provisions are all optional; they do not force sustainability, green business practices, or corporate social responsibility on any firm. Rather, they encourage green businesses and practices by offering both an added measure of protection for voluntary green business decisions and a structure for firms wishing to commit themselves to green corporate governance. There are two reasons for this approach. First, current corporate law permits, but does not require, firms to engage in social responsibility, and the proposals leave what is viewed as a highly successful area of the law intact.<sup>46</sup> The proposals fit within this enabling framework.<sup>47</sup> The second reason is practical: to have any realistic chance of enactment, even in a state like Oregon with a receptive political climate, green reforms to corporate law must not negatively impact the state's existing corporations or frighten them out of the jurisdiction.<sup>48</sup> This

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<sup>44</sup> 2009 OR. BUS. PLAN, *supra* note 42, at 8–9.

<sup>45</sup> Of course, other states may pursue green reforms to corporate law as well. States such as California, Colorado, Vermont, Washington, and Wisconsin share many of Oregon's characteristics and would likewise be logical candidates for these reforms.

<sup>46</sup> See JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA*, at xv (2003) ("The most important organization in the world is the company: the basis of the prosperity of the West and the best hope for the future of the rest of the world."); William T. Allen, *Modern Corporate Governance and the Erosion of the Business Judgment Rule in Delaware Corporate Law* 1 (Osgoode Hall Law Sch., Comparative Research in Law & Political Econ., Research Paper No. 06/2008, 2008), available at <http://ssrn.com/abstractid=1105591> ("The modern business corporation is the instrumentality within which the greatest part of our economic activity occurs, in which jobs and wealth are created and through which, to a great extent, our national competitiveness is maintained.").

<sup>47</sup> See WILLIAM T. ALLEN ET AL., *COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION* 92 (3d ed. 2009) ("The typical corporation statute of today . . . is a nonregulatory, 'enabling' statute with few mandatory features.").

<sup>48</sup> For a more dramatic call for corporate law reform, see KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006).

admittedly limits the potential of the proposed reforms but makes their adoption and therefore their impact more likely.

### A. General Provisions

The first category of green corporate law reforms consists of two provisions, the first of which is a generally applicable other constituency statute. As noted above, a majority of American jurisdictions have such provisions expressly permitting corporate fiduciaries to consider the interests of shareholder and nonshareholder constituencies alike when making company decisions.<sup>49</sup> To become a little greener, a jurisdiction without an other constituency statute should adopt one, and a jurisdiction with an other constituency statute limited to takeover situations should remove the limitation.<sup>50</sup> Particularly in a state where corporate law on the business judgment rule is sparse or uneven,<sup>51</sup> a generally applicable other constituency statute would offer corporate managers a welcomed assurance that they may view the firm's interests broadly by considering more than just shareholders when conducting company business.<sup>52</sup>

A second generally applicable provision helpful to attracting green business to a state is a statutory provision explicitly granting firms the power to conduct business in a sustainable and socially responsible manner. Corporate codes already contain lengthy provisions conferring specific powers on firms,<sup>53</sup> including the power to make charitable gifts.<sup>54</sup> While firms can already conduct business in a

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<sup>49</sup> See *supra* notes 32–34 and accompanying text.

<sup>50</sup> In both cases, the statute should specify that corporate fiduciaries may consider the environmental, social, and financial implications of corporate decisions. See *supra* notes 14–20 and accompanying text (discussing the triple bottom line); *supra* note 41 (quoting the triple-bottom-line language in the proposed revision to Oregon's other constituency statute); *infra* Appendix § x.

<sup>51</sup> See *supra* note 31 (questioning the reliability of the business judgment rule in Oregon).

<sup>52</sup> Indeed, in a state without a developed business judgment rule, a generally applicable other constituency statute would clarify this point of law and benefit all corporations and their shareholders. See *Joy v. North*, 692 F.2d 880, 885–86 (2d Cir. 1982) (demonstrating the shareholder benefits of the business judgment rule); *ALLEN ET AL.*, *supra* note 47, at 257 (suggesting that director exculpation provisions are similarly in shareholders' best interests).

<sup>53</sup> E.g., DEL. CODE ANN. tit. 8, § 122 (2009); MODEL BUS. CORP. ACT § 3.02 (2002).

<sup>54</sup> E.g., DEL. CODE ANN. tit. 8, § 122(9) (2009) (conferring the power to “[m]ake donations for the public welfare or for charitable, scientific or educational purposes, and in time of war or other national emergency in aid thereof”); MODEL BUS. CORP. ACT § 3.02(13) (2002) (authorizing similar donations).

sustainable, socially responsible way, specifically enumerating the power to do so would, like an other constituency statute, clarify this point and perhaps encourage hesitant firms to act more responsibly.<sup>55</sup>

### *B. Provisions for Electing Corporations*

A second, more ambitious group of green corporate law reforms consists of provisions specially designed for, and only applicable to, electing green corporations. Modeled on the close corporation subchapters in some corporate codes,<sup>56</sup> the green corporate provisions presented here form a cohesive legislative scheme for firms wishing to opt into a stricter, greener model of corporate governance.

The provisions begin by clarifying that they apply to electing green corporations only,<sup>57</sup> and set forth a procedure for firms to elect green corporation status.<sup>58</sup> According to the proposed legislation, a company must include in its charter both a statement that the firm is a green corporation<sup>59</sup> and a statement that the business shall be conducted in a financially, environmentally, and socially responsible manner.<sup>60</sup> Therefore, to qualify as a green corporation, a firm must commit itself to sustainability in its core corporate document and do so publicly, putting would-be shareholders and others on notice of how the firm is to be managed.<sup>61</sup>

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<sup>55</sup> See *infra* Appendix § y.

<sup>56</sup> See tit. 8, §§ 341–356.

<sup>57</sup> See *infra* Appendix §§ 1, 11; cf. tit. 8, § 341(a) (“This subchapter applies to all close corporations, as defined . . . . Unless a corporation elects to become a close corporation under this subchapter in the manner prescribed in this subchapter, it shall be subject in all respects to this chapter, except this subchapter.”); tit. 8, § 356 (“This subchapter shall not be deemed to repeal any statute or rule of law which is or would be applicable to any corporation which is organized under this chapter but is not a close corporation.”).

<sup>58</sup> See *infra* Appendix §§ 2–4; cf. tit. 8, §§ 342–344 (setting forth the same procedure for a close corporation).

<sup>59</sup> See *infra* Appendix § 2; cf. tit. 8, § 343(1) (requiring a statement in articles of incorporation for a close corporation).

<sup>60</sup> See *supra* note 37 and accompanying text (discussing Oregon House Bill 2826, which expressly permits firms to include such language in their charters).

<sup>61</sup> See *Hearing on H.R. 2826 Before the S. Judiciary Comm.*, 74th Legis. Assem., Reg. Sess., Exhibit B, at 2 (Or. 2007) (written testimony of Jeffrey C. Wolfstone, Partner, Lane Powell PC, and General Counsel, Nau, Inc.) (describing a sustainability commitment in a corporate charter as “baked in” to a firm’s DNA). To the extent the firm’s green business management philosophy is presented to investors up front, it becomes both part of the investors’ hypothetical bargain with management and legitimate under the “nexus of contracts” conception of the corporation. See Sneirson, *Green Is Good*, *supra* note 1, at 1016–17 (relating the nexus of contracts view of the corporation to sustainability). For a

Next, the provisions require that green corporations confer board representation on nonshareholder constituencies, such as the company's employees and the community in which the company conducts most of its operations.<sup>62</sup> The idea of "constituency directors" for nonshareholder groups or for different classes of investors is not new,<sup>63</sup> and studies have shown that such diverse perspectives tend to improve the quality of group decision making.<sup>64</sup> In addition, as a matter of their duty of care, green corporate boards should consult with nonshareholder constituencies in making company decisions whenever possible.<sup>65</sup> Like the proposal for nonshareholder board representation, such consultation tends to

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succinct description of the nexus of contracts theory of the corporation, see BAINBRIDGE, *supra* note 3, § 1.5, at 26.

<sup>62</sup> See *infra* Appendix § 8. Although the proposed legislation charges these directors with representing their constituencies' interests in board deliberations, these officers, like all directors, owe their fiduciary duties to and must act in the best interests of the entire enterprise. See E. Norman Veasey & Christine T. Di Guglielmo, *How Many Masters Can a Director Serve? A Look at the Tensions Facing Constituency Directors*, 63 BUS. LAW. 761, 772–75 (2008) (advising constituency directors to beware of potential conflicts).

<sup>63</sup> See Marleen O'Connor, *Labor's Role in the American Corporate Governance Structure*, 22 COMP. LAB. L. & POL'Y J. 97, 102–03 (2000) (discussing the representation of employees on a company's board); Veasey & Di Guglielmo, *supra* note 62, at 762 (discussing constituency directors representing preferred stockholders); Brian Hamer, Note, *Serving Two Masters: Union Representation on Corporate Boards of Directors*, 81 COLUM. L. REV. 639, 639–40 (1981). For a comparative perspective, see Mark J. Loewenstein, *Stakeholder Protection in Germany and Japan*, 76 TUL. L. REV. 1673 (2002), which notes that German and Japanese firms reserve supervisory board representation for employee representatives. There are also American examples. See UAL Corp., Restated Certificate of Incorporation of UAL Corporation (Feb. 1, 2006), available at [http://media.corporate-ir.net/media\\_files/IROL/83/83680/governance/UAL\\_Restated.PDF](http://media.corporate-ir.net/media_files/IROL/83/83680/governance/UAL_Restated.PDF) (providing for pilot and machinist board representation on the United Airlines board).

<sup>64</sup> BAINBRIDGE, *supra* note 3, at 208–09 & nn.4–5; Kent Greenfield, Debate, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 957–58, 978–83 (2008) (extolling the "benefits of group decisionmaking"); see also David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33, 51 (2003) (finding a statistically significant relationship between board diversity and firm value); Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J.L. BUS. & FIN. 85, 99–100 (2000) (citing studies on diversity and group decision making). But see Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. CIN. L. REV. 431, 433 nn.4–5 (2008) (citing conflicting empirical studies).

<sup>65</sup> See Sneirson, *Doing Well*, *supra* note 2, at 468–77 (arguing that corporate fiduciaries must, as a matter of their duty of care, consider all reasonably available material information in their decision making, including the impact of their decisions on nonshareholder constituencies).

produce better-informed, and substantively better and greener, business decisions.<sup>66</sup>

And third, the green reforms to corporate law require electing corporations to make periodic triple bottom-line disclosures that account for the firm's recent activities in financial, environmental, and social terms.<sup>67</sup> Such disclosures would enable investors to make informed decisions about both whether and where to invest and how to vote in corporate elections.<sup>68</sup> Green disclosures would also serve to disseminate information on sustainable business practices, including sustainable manufacturing processes, allowing other firms to learn from them, perhaps improve upon them, and likewise become more sustainable.<sup>69</sup> Most importantly, these green disclosures would "affect corporate conduct."<sup>70</sup> By forcing social and environmental performance out into the open alongside financial results, managers gain a greater incentive to "reduce those impacts that shareholders could interpret as negative"<sup>71</sup> and do more "for their communities, their employees, and the long-term welfare of the company."<sup>72</sup> Many

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<sup>66</sup> See Stephen M. Bainbridge, *Why a Board?: Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 19–27 (2002) (examining group decision-making literature in cognitive psychology and behavioral economics and concluding that better information and deliberation allow boards to produce better decisions); see also Jensen, *supra* note 26, at 9 ("[T]he process of [assessing stakeholder interests] can add significant value by helping managers understand both the company's strategy and the drivers of value in their businesses.").

<sup>67</sup> See *infra* Appendix § 9; see also *supra* notes 16–20 and accompanying text (discussing the triple bottom line in general and as an accounting structure).

<sup>68</sup> See Williams, *supra* note 21, at 1210–11.

<sup>69</sup> Although it would seem counterintuitive, some firms already share such information. See Mary Tripsas, *Everybody in the Pool of Green Innovation*, N.Y. TIMES, Nov. 1, 2009, at B5.

<sup>70</sup> Cf. Williams, *supra* note 21, at 1210–11 (noting that Congress intended the securities laws' disclosure requirements "to affect corporate conduct" and arguing that corporate social responsibility disclosures will improve companies' social and environmental performance).

<sup>71</sup> *Id.* at 1295 (positing that "there would be a 'shrinking quality' to actions that managers would be willing to take in relative secrecy, but would not want to disclose to their shareholders or to have published on the front page of the *New York Times*" (quoting Felix Frankfurter, *The Federal Securities Act: II*, FORTUNE, Aug. 1933, at 55)); see also Felix Frankfurter, *supra*, at 53, 55 ("[P]ublicity is potent . . . to force knowledge of [excessive commissions and salaries] into the open is largely to restrain their happening. Many practices safely pursued in private lose their justification in public.").

<sup>72</sup> Williams, *supra* note 21, at 1295–96 ("Under expanded social disclosure, these actions would all appear in the 'positive effects' column of the social accounting ledger, whereas currently they only show up in the 'negative income' column of the financial accounting ledger.").



states currently supplement federal securities laws with their own financial reporting requirements,<sup>73</sup> and many businesses already voluntarily make public “corporate responsibility” disclosures in one form or another.<sup>74</sup> Requiring these disclosures of green corporations would not only lead to more thoughtful, sustainable business practices and procedures, the requirement would also provide a means for holding green corporations to their commitments.

In enforcing these proposed provisions consistently with existing corporate law, courts should largely defer to corporate fiduciaries’ informed, disinterested, good-faith business decisions, even if the choices appear to be too sustainable, or not sustainable enough, for some of the company’s stakeholder groups. To be sure, this detracts from the mandatory language in a green corporation’s charter directing the firm to conduct its business sustainably. However, this deference also avoids the prospect of courts or other governmental bodies passing judgment on and second-guessing green corporations’ business decisions.<sup>75</sup> Instead these reforms are to be largely self-enforcing: if a green corporation fails to comply with its disclosure or other obligations, then it should lose its green corporation status and the benefit of any associated perks.<sup>76</sup>

The mere adoption of these corporate law reforms, together with any attendant publicity, may be enough to attract green businesses to incorporate or reincorporate as a formal “green corporation” within a jurisdiction.<sup>77</sup> Firms may also seek green corporation status to curry favor with consumers who, according to several studies, prefer green firms and their products and services.<sup>78</sup> A state can enhance this

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<sup>73</sup> See, e.g., MODEL BUS. CORP. ACT § 16.20 (2002).

<sup>74</sup> See *supra* note 20 (citing the corporate responsibility websites of several major U.S. companies). For an innovative application of the federal securities laws to corporate social responsibility, see Williams, *supra* note 21, at 1199, which interprets the federal securities laws to require disclosures about “management’s policies and practices with respect to social and environmental issues” and thereby achieve “corporate social transparency.”

<sup>75</sup> The approach here thus differs from that of the B Corporation private certification model, in which firms must meet certain social and environmental standards, demonstrate their compliance, and possibly undergo an audit. See generally Sneirson, *Green Is Good*, *supra* note 1, at 1017–19; Certified B Corp., About B Corp., <http://www.bcorporation.net/about> (last visited Jan. 8, 2010).

<sup>76</sup> These perks might include tax incentives. See *infra* notes 80–81 and accompanying text.

<sup>77</sup> In other words, “If you build it, they will come.” Cf. FIELD OF DREAMS (Universal Pictures 1989) (“If you build it, he will come.”).

<sup>78</sup> Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board’s Decision to Engage in Social*

reputational benefit by creating a “green corporation” mark, like the USDA organic symbol, and licensing it for use by electing firms.<sup>79</sup> Such a mark could also aid socially responsible investors, money managers, and trustees with specific investment directives in more easily identifying and screening firms.

States can also encourage green business incorporations through financial incentives such as reduced or eliminated franchise tax rates.<sup>80</sup> States already exempt certain types of corporations from franchise tax obligations,<sup>81</sup> and any revenues foregone might be more than offset by both green businesses and jobs that locate in the state and the, admittedly, intangible good that those green corporations do both within and without a specific jurisdiction’s borders.

### C. Concerns

Recent experience involving relatively innocuous corporate law reforms suggests that the proposals made here may give some pause. For example, Nike, Inc.—perhaps the largest Oregon corporation—expressed concern about the proposal to broaden Oregon’s other constituency statute, fearing unintended consequences to its governing law.<sup>82</sup> And in California—one of the few states without any other constituency statute—the legislature recently overcame

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*Entrepreneurship*, 29 CARDOZO L. REV. 623, 664–65 (2007) (citing studies measuring “a strong positive relationship between [Corporate Social Responsibility] behaviors and consumers’ reactions to a company’s products and services”); *see also* Ray Fisman et al., Corporate Social Responsibility: Doing Well by Doing Good? 16 (Sept. 2005) (unpublished manuscript), <http://www.kellogg.northwestern.edu/research/fordcenter/conferences/ethics06/heal.pdf> (noting that corporate social responsibility is more positively related to profitability in advertising-intensive, consumer-oriented industries). This may be the case in business-to-business transactions as well. *See* ELKINGTON, *supra* note 16, at 110, 119 (relating anecdotes).

<sup>79</sup> *See* Sneirson, *Green Is Good*, *supra* note 1, at 1017 & n.159 (discussing the “B Corporation” private certification system and associated mark for sustainable businesses and noting similar private certification marks, including LEED building designations).

<sup>80</sup> *See infra* Appendix § 10.

<sup>81</sup> *See* DEL. CODE ANN. tit. 8, § 501 (2009).

<sup>82</sup> Conversation with Jim Carter, Vice President & Gen. Counsel, Nike, Inc., in Eugene, Or. (Apr. 18, 2009). Nike is otherwise a strong proponent of sustainability and sustainable business practices. *See* Sneirson, *Green Is Good*, *supra* note 1, at 994 (profiling Nike’s sustainability philosophy and efforts); Tripsas, *supra* note 69 (noting Nike’s involvement in the Green Xchange initiative for sharing sustainability innovations). When Oregon enacted House Bill 2826, similar concerns arose. *See* Andy Giegerich, *Some Biz Lawyers Worry over Sustainability Effort*, PORTLAND BUS. J., Apr. 18, 2008, available at <http://boston.bizjournals.com/portland/stories/2008/04/21/focus7.html> (interviewing lawyers wary of changes to the Oregon corporate code).

opposition from the business section of the state bar<sup>83</sup> and others<sup>84</sup> and passed a generally applicable other constituency statute, only to have Governor Arnold Schwarzenegger veto the bill.<sup>85</sup> Governor Schwarzenegger's veto message articulates some of the same concerns that arose in Oregon, including the concern that the bill "could produce unknown ramifications."<sup>86</sup>

Such concerns are misguided. A broadened other constituency statute would not upset current corporate law in any way; indeed, in the many jurisdictions that have adopted one, it has had no such effect.<sup>87</sup> Rather, such provisions merely bolster the business judgment rule and ensure that boards' informed, disinterested, good-faith business decisions will be respected if challenged in court.<sup>88</sup> Particularly in jurisdictions like Oregon, where the business judgment rule finds inconsistent support, a broad other constituency statute offers welcomed, needed clarity to this bedrock corporate law principle. The statute would also help dispel the notion that corporate

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<sup>83</sup> Letter from W. Derrick Britt, Vice Chair of Legislation, Bus. Law Section, State Bar of Cal., to the Office of Governmental Affairs (Apr. 14, 2008), *available at* <http://www.calbar.ca.gov/calbar/pdfs/sections/buslaw/corporations/ab-2944-statement-of-position-final.pdf> (opposing the legislation on the ground that it would make directors less accountable, but also noting that no "California law . . . prevents directors [from] adopting socially responsible corporate policies").

<sup>84</sup> See Amy Westervelt, *New Calif. Bill Aims to Allow Double-Bottom Line*, SUSTAINABLE INDUSTRIES, May 2008, <http://www.sustainableindustries.com/breakingnews/19183154.html> (noting opposition from the California Chamber of Commerce and the California Manufacturers and Technology Association).

<sup>85</sup> See Letter from Arnold Schwarzenegger, Governor, State of Cal., to the Members of the Cal. State Assembly (Sept. 30, 2008), *available at* [http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab\\_2901-2950/ab\\_2944\\_vt\\_20080930.html](http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2944_vt_20080930.html).

<sup>86</sup> See *id.* Governor Schwarzenegger's veto message also reveals a flawed understanding of California corporate law. In his summary, the governor writes that the "bill would permit corporate directors to consider a variety of new factors other than strictly financial return when making business decisions on behalf of a corporation." *Id.* Of course, California corporate directors may already consider such nonfinancial factors when making company decisions, as the corporation committee of the state bar noted in its opposition memorandum. Letter from W. Derrick Britt, *supra* note 83, at 4. Such considerations are also protected under California's business judgment rule. See, e.g., *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940, 944–45 (Cal. 1999) (setting forth California's business judgment rule); *Biren v. Equal. Emergency Med. Group, Inc.*, 125 Cal. Rptr. 2d 325, 330–32 (Ct. App. 2002) (same).

<sup>87</sup> See BAINBRIDGE, *supra* note 3, § 9.2, at 415–16 (opining that other constituency statutes have not changed corporate directors' fiduciary duties).

<sup>88</sup> See *supra* notes 31–34 and accompanying text. Indeed, the firms opposing other constituency statutes in Oregon and California should affirmatively desire added clarification and support for the business judgment rule as it would insulate their boards' decisions from shareholder suits premised on mere mismanagement.

law obligates fiduciaries to maximize shareholder wealth and embolden them to view their firms and responsibilities more broadly.<sup>89</sup>

A provision expressly conferring the power to engage in sustainable business practices on corporations would likewise work no harm to current corporate law. Firms may already conduct their operations in this manner, in fact many do, and an express grant of authority would simply offer explicit statutory support for their activities.<sup>90</sup>

The separate set of green corporate law provisions only applicable to electing firms should likewise cause no concern for other, nonelecting corporations. Like close-corporation-specific laws, the proposed green corporate law provisions make clear both that they do not apply to nonelecting corporations, and that no generally applicable corporate law provision is to be affected by them.<sup>91</sup>

#### CONCLUSION

By enacting the proposed green reforms to corporate law and creating a body of special provisions for companies electing green corporation status, a state like Oregon can both make its corporate laws more amenable to firms wishing to pursue green business strategies and attract firms wishing to commit to a greener model of corporate governance. Further, if other states follow suit and green their corporate codes as well, corporations in these jurisdictions may more confidently engage in green business practices and do their part to make business and the world more sustainable.

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<sup>89</sup> Sneirson Testimony, *supra* note 41 (discussing the need for an expanded other constituency statute).

<sup>90</sup> See *supra* note 50 and accompanying text.

<sup>91</sup> See *infra* Appendix §§ 1, 11; *cf.* DEL. CODE ANN. tit. 8, §§ 341, 356 (2009).

## APPENDIX

[subsection to be added to an other constituency statute]:

“(x) environmental, social, and financial considerations that are reasonably regarded as appropriate to the responsible conduct of the corporation’s business . . .”

[subsection to be added to a list of specific powers like DEL. CODE ANN. tit. 8, § 122 (2009) or MODEL BUS. CORP. ACT § 3.02 (2002)]:

“(y) conduct its business in a sustainable and socially responsible manner.”

[subchapter to be added]:

Subchapter XX: Green Corporations, Special Provisions

§ 1. Law applicable to green corporations.

This subchapter applies to all green corporations, as defined in § 2 of this subchapter. Unless a corporation elects to become a green corporation under this subchapter in the manner prescribed, it shall be subject in all respects to this chapter, except this subchapter.

§ 2. Green corporation defined; contents of articles of incorporation.

A green corporation is a corporation organized under this chapter whose articles of incorporation contain the provisions required by § [ . . . ] of this chapter and, in addition, (a) contain a heading stating the name of the corporation and that it is a green corporation; and (b) provide that the corporation shall conduct its business in a sustainable and socially responsible manner.

§ 3. Formation of a green corporation.

A green corporation shall be formed in accordance with § [ . . . ] of this chapter, except that its articles of incorporation shall contain the provisions required by § 2 of this subchapter.

§ 4. Election of an existing corporation to become a green corporation.

Any corporation organized under this chapter may become a green corporation under this subchapter by executing, acknowledging, and filing, in accordance with § [ . . . ] of this title, amended articles of

incorporation that contain both a statement electing to become a green corporation and the provisions required by § 2 of this subchapter. Such amendment shall be adopted in accordance with the requirements of §§ [ . . . ] of this title.

§ 5. Limitations on continuation of green corporation status.

A green corporation continues to be such and to be subject to this subchapter until:

(a) it files amended articles of incorporation with the Secretary of State deleting the provisions required by § 2 of this subchapter to be stated in the articles of incorporation to qualify it as a green corporation or

(b) any of the provisions or conditions required by §§ 2, 8, and 9 of this subchapter has in fact been breached, and neither the corporation nor any of its shareholders takes the steps required to prevent such loss of status or to remedy such breach.

§ 6. Voluntary termination of green corporation status by amendment of articles of incorporation; vote required.

(a) A corporation may voluntarily terminate its status as a green corporation and cease to be subject to this subchapter by amending its articles of incorporation to delete therefrom the additional provisions required by § 2 of this subchapter. Any such amendment shall be adopted and shall become effective in accordance with § [ . . . ] of this title.

(b) The articles of incorporation of a green corporation may provide that, on any amendment to terminate its status as a green corporation, a vote greater than [ . . . ] shall be required, and, if the articles of incorporation contain such a provision, that provision shall not be amended, repealed, or modified by any vote less than that required to terminate the corporation's status as a green corporation.

§ 7. Involuntary termination of green corporation status.

(a) If any event occurs as a result of which one or more of the provisions or conditions required by §§ 2, 8, and 9 of this subchapter has in fact been breached, the corporation's status as a green corporation under this subchapter shall terminate, unless the corporation takes such steps as are necessary to correct the situation that threatens its status as a green corporation within 30 days after the

occurrence of the event or within 30 days after the event has been discovered, whichever is later.

(b) The [court], upon the suit of the corporation or any stockholder, shall have jurisdiction to issue all orders necessary to either prevent the corporation from losing its status as a green corporation or restore its status as a green corporation by enjoining, or setting aside, any act or threatened act on the part of the corporation or a shareholder that would be inconsistent with any of the provisions or conditions required by §§ 2, 8, and 9 of this subchapter, unless it is an act approved in accordance with § 6 of this subchapter.

§ 8. Board representation.

(a) At least one member of the board of directors shall be chosen from among the corporation's nonmanagement employees and represent those employees' interests in board deliberations.

(b) At least one member of the board of directors shall be chosen from the community in which the corporation conducts the majority of its operations and represent the community's interests in board deliberations.

§ 9. Annual sustainability statements.

Green corporations organized under this subchapter shall make available—to their shareholders and the public—annual sustainability statements that describe the corporation's financial, environmental, and social performance over the fiscal year. Such statements:

(a) shall be prepared in accordance with the current version of the Global Reporting Initiative Sustainability Reporting Guidelines or, if not, shall describe the basis of preparation; and

(b) may be consolidated or combined statements of the corporation and one or more of its subsidiaries, as appropriate.

§ 10. Exemption from franchise tax.

Green corporations organized under this subchapter and meeting the conditions required by §§ 2, 8, and 9 of this subchapter shall be exempt from paying an annual tax for the corporate franchise as prescribed in this chapter.

[and amend franchise tax provision accordingly]

§ 11. Effect of this subchapter on other laws.

This subchapter shall not be deemed to repeal any statute or rule of law that is or would be applicable to any corporation that is organized under this chapter but is not a green corporation.